SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2020 0003

TSUN SHING IP — Applicant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P and WEINBERG JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	Determined on the papers
DATE OF JUDGMENT:	24 August 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 211
JUDGMENT APPEALED FROM:	[2017] VCC 1169 (Judge Tinney)

CRIMINAL LAW – Appeal – Sentence – Parity – Disparity resulting from co-offender's successful sentence appeal – Attempting to possess commercial quantity of border controlled drug – Dealing with money reasonably suspected of being proceeds of crime – Co-offender sentenced on equivalent charges – Co-offender's sentence reduced on appeal – Whether original sentencing differential should be restored – Crown concession – Appeal allowed – Applicant resentenced – Total effective sentence of 8 years and 5 months' imprisonment – Non-parole period of 5 years – *Tregenza v The Queen* [2015] VSCA 163 applied.

REPRESENTATION:	Counsel	Solicitors
For the Applicant	Mr C Carr	Lethbridges
For the Respondent	Ms K Breckweg	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)

MAXWELL P
WEINBERG JA:

1 ***Summary***

2 The applicant, Tsun Shing Ip, and a co-offender, Kai Yang Kao ('Kao'), each pleaded guilty to one charge of attempting to possess a commercial quantity of a border controlled drug and two charges of dealing with money reasonably suspected of being proceeds of crime. The applicant and Kao were engaged in joint offending but each was sentenced for his own dealings, rather than being charged as a co-offender in the dealings of the other.

3 The applicant was sentenced to a total effective sentence of nine years' imprisonment, and a non-parole period of 5 years and 4 months was fixed. Kao was sentenced to a total effective sentence of 11 years' imprisonment, with a non-parole period of 6 years and 10 months. The sentencing relativities between the two offenders were arrived at by the judge after careful consideration of their respective roles, the seriousness of their respective offences and the mitigating factors on which each offender could rely.

4 In April 2019, Kao appealed his sentence to this Court. The sentences on the proceeds of crime charges were held to be manifestly excessive and were reduced, resulting in a lower total effective sentence. The non-parole period was reduced to 6 years and 6 months.

5 The applicant now seeks leave to appeal against his sentence on two grounds: first, that his sentence is manifestly excessive for essentially the same reasons that Kao's sentence was found to be manifestly excessive; and second, on the basis of parity, that the resentencing of Kao resulted in insufficient differentiation between their sentences.

6 The respondent concedes that the applicant should be granted leave to appeal, and that the appeal should be allowed, on ground 2. She further concedes that the applicant should be resentenced so as to restore the original sentencing relativities

between himself and Kao.

7 That was, in our view, a proper concession to make in the circumstances. We will make orders accordingly. The applicant will be resentenced to a total effective sentence of 8 years and 5 months' imprisonment, and we will set a non-parole period of 5 years.

The circumstances of the offending[1]

8 Between 1 March and 18 March 2016, Kao dealt with $567,138 across several transactions. These transactions were in the nature of transfers to Chinese or Hong Kong bank accounts, cash deposits into Kao's ANZ account and a cash withdrawal (charge 1 – Kao).

9 Between 10 March and 17 March 2016, the applicant dealt with $200,000. This involved him depositing two separate sums of $100,000 into his account and then transferring the amounts to an unknown account (charge 4 – applicant).

10 On 29 March 2016, Kao and the applicant boarded a flight to Sydney, where they checked in to a hotel. That evening they boarded an overnight train from Sydney to Melbourne. The following morning, they were stopped and searched by uniformed police. Kao was found in possession of $206,950 and the applicant was found with $150,050. A search conducted the same day at their address located $15,065 and a money counting machine (charge 2 – Kao; charge 5 – applicant).

11 On 20 April 2016, police executed a search warrant at the applicant and Kao's address. Police located a consignment of 200 glass vials which had been consigned to a Mr Leung and collected by him at the post office on 13 April 2016. Mr Leung had been engaged by Kao to collect the shipment and had delivered it to the applicant on 14 April 2016.

[1] The circumstances of offending are a brief summary of the prosecution opening which was tendered on the plea of the applicant and Kao.

12 Originally, each vial contained liquid methamphetamine (1.4234 kg with 36.8 per cent purity). The consignment of vials had been intercepted by police, however, and the methamphetamine replaced with an inert substance. The total quantity of pure methamphetamine was 523.8 gm.

13 Police located a consignment of noodle packets, also addressed to Mr Leung. The consignment contained 55 packets, in which was found a total quantity of pure methamphetamine of 1.826 kg (charge 3 – Kao; charge 6 – applicant).

14 The applicant was sentenced in the County Court as set out below:

15 ge	**16 Offence**	**17 m**	**18 S entence**	**19 C umulation**
20	**Indictment** CR-17-00479 & CR-17-00480			
21	22 Dealing with money reasonably suspected of being proceeds of crime 23 s 400.9(1) *Criminal Code* (Cth)	24	25 1 4 months	26 C ommence 18 February 2025 (8 months cumulation on charge 6)
27	28 Dealing with money reasonably suspected of being proceeds of crime 29 s 400.9(1) *Criminal Code* (Cth)	30	31 1 2 months	32 C ommence 18 August 2025 (4 months cumulation on charge 4)
33	34 Attempt to possess a commercial quantity of a border controlled drug 35 ss 11.1(1) and 311.14(1) *Criminal*	36	37 8 years	38 B ase 39 C ommence 18 August 2017

	Code (Cth)			
40	**Total effective sentence:**	41	9 years' imprisonment	
42	**Non-parole period:**	43	5 years and 4 months	
44 **45**	**6AAA statement:**	46	13 years' imprisonment with a non-parole period of 9 years	
47	**Other relevant orders:**	48	Forfeiture order	

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63 Kao was sentenced as set out below:

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65 Count	66 Offence	67 Maximum	68 Sentence	69 Cumulation
70	**Indictment** CR-17-00479 & CR-17-00480			
71	72 Dealing with money reasonably suspected of being proceeds of crime s 400.9(1) *Criminal Code* (Cth)	73	74 2 years	75 Commence 18 April 2026 (1 year cumulation on charge 3)
76	77 Dealing with money reasonably suspected of being proceeds of crime s 400.9(1) *Criminal Code* (Cth)	78	79 14 months	80 Commence 18 June 2025 81 (4 months' cumulation on charge 1)
82	83 Attempt to possess a commercial quantity of a border controlled drug 84 ss 11.1(1) and 311.14(1) *Criminal Code* (Cth)	85	86 9 years and 8 months	87 Base 88 Commence 18 August 2017
89	**Total effective**	90	11 years' imprisonment	

sentence:	
91 Non-parole period:	92 6 years and 10 months' imprisonment
93 6AAA statement:	94 15 years' imprisonment with a non-parole period of 11 years
95 Other relevant orders:	96 Forfeiture order

97 On 11 April 2019, this Court found that the sentences imposed on Kao for the offences of dealing with money reasonably suspected of being the proceeds of crime were manifestly excessive.[2] Kao was resentenced to a total effective sentence of 10 years and 5 months' imprisonment and a non-parole period of 6 years and 6 months, as set out below:

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99 e	**100 Offence**	**101 m**	**102 Sentence**	**103 Cumulation**
104 **Indictment** CR-17-00479 & CR-17-00480				
105	106 Dealing with money reasonably suspected of being proceeds of crime 107 s 400.9(1) *Criminal Code* (Cth)	108	109 15 months	110 Commence 18 July 2026 (6 months on charge 3)
111	112 Dealing with money reasonably	114	115 9 months	116 Commence 18 April 2027 (3

[2] *Kao v The Queen* [2019] VSCA 84, [72]–[74] (McLeish and T Forrest JJA).

	suspected of being proceeds of crime 113 s 400.9(1) *Criminal Code* (Cth)			months on charge 1)
117	118 Attempt to possess a commercial quantity of a border controlled drug 119 ss 11.1(1) and 311.14(1) *Criminal Code* (Cth)	120	121 9 years and 8 months	122 Base 123 Commence 18 August 2017
124 sentence:	**Total effective**	125 10 years and 5 months' imprisonment		
126 period:	**Non-parole**	127 6 years and 6 months' imprisonment		
128 129	**6AAA statement:**	130 14 years and 9 months' imprisonment with a non-parole period of 10 years and 9 months		
131 orders:	**Other relevant**	132 Forfeiture order		

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The grounds of appeal

141 The applicant contends that the sentences imposed on him on the proceeds of crime charges are manifestly excessive, for essentially the same reasons as the corresponding sentences imposed on Kao were held to be manifestly excessive.[3] The applicant submits that, when compared against the maximum penalty of three years and in light of the mental element that permissibly and properly falls within the offence charged, the sentences imposed are outside the range reasonably open to the judge.

142 The applicant also contends that the convergence between the sentences which resulted from the resentencing process ought to be corrected. He argues that the proper approach in such a case is as set out by this Court in *Tregenza v The Queen*. That is, although this Court is not obliged to restore the original relativity between the sentences,[4] the matter should be approached:

> on the basis that the distinction drawn by [the judge] between the co-offenders should be maintained, in the absence of some identifiable error or further fact which necessitates a different course.

143 Counsel for the respondent conceded that the lack of differentiation between the

[3] Ibid [65]–[72] (McLeish and T Forrest JJA).

[4] *Tregenza v The Queen* [2015] VSCA 163, [41] (Redlich, Weinberg and Osborn JJA).

Ibid.

sentences consequent upon the resentencing of Kao could not be justified. The appeal should therefore be allowed and the applicant resentenced so as to restore the sentencing relativities established by the sentencing judge. As a result, there was no need to determine ground 1.

144 Consideration

145 This appeal illustrates how the resentencing of one co-offender can give rise to a parity complaint from another co-offender. As the respondent properly concedes, the applicant is entitled to a restoration of the sentencing relativities between the offenders arrived at by the sentencing judge, who had the benefit of hearing the pleas of both offenders at the same time.

146 As the parity principle requires, the judge carefully considered the similarities and differences between the offenders and between their respective offences, in order to determine what the appropriate sentencing differential should be. Relevant differences included the fact that Kao's offending was more serious and that Kao had recruited the applicant.[5] Both the applicant and Kao had similar factors going to mitigation, including pleading guilty at an early stage, low risk of reoffending and no criminal history.[6] At the time of the offending, the applicant was 25 years old and Kao was 22 years old.[7] Taking these matters into consideration, the sentencing judge imposed a longer sentence on Kao in total and for each offence.

147 The reduction in Kao's sentence on appeal resulted in his receiving a similar sentence to the applicant for charge 1 and a lower sentence than the applicant on charge 2. In other words, the original sentencing differential — which properly reflected the similarities and differences between the two — was eliminated. The resultant lack of differentiation between them could not be reasonably justified.[8]

5 *DPP v Kao and Ip* [2017] VCC 1169, [23], [60], [66] (Judge Tinney).

6 Ibid [2], [16]–[20], [27].

7 Ibid [23], [25].

8 *Nipoe v The Queen* [2020] VSCA 137, [38]–[40] (Maxwell P, Niall and Emerton JJA); *Topal v The Queen* [2019] VSCA 289, [21]–[24] (Maxwell P and Niall JA); *Sharp v The Queen* [2018] VSCA 327, [48]–[54] (Maxwell P and Niall JA).

148 In our respectful opinion, the judge's approach to relativity was carefully considered and well founded. There is no suggestion of error. The original differential should therefore be restored.

149 In the circumstances, there is no need to determine ground 1. We would grant leave to appeal and allow the appeal on ground 2. We will set aside the original sentence and resentence the applicant as follows:

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151 rge	**152 Offence**	**153 M aximum**	**154 S entence**	**155 Cu mulation**
156	**Indictment** CR-17-00479 & CR-17-00480			
157	158 Dealing with money reasonably suspected of being proceeds of crime 159 s 400.9(1) *Criminal Code* (Cth)	160 3 years' imprisonment	161 9 months' imprisonment	162 Co mmence 18 February 2025 (3 months cumulation on charge 6)
163	164 Dealing with money reasonably suspected of being proceeds of crime 165 s 400.9(1) *Criminal Code* (Cth)	166 3 years' imprisonment	167 7 months' imprisonment	168 Co mmence 18 June 2025 (2 months cumulation on charge 4)
169	170 Attempt to possess a commercial quantity of a border controlled drug	172 L ife imprisonment	173 8 years' imprisonment	174 Ba se 175 Co mmence 18 August 2017

	171 ss 11.1(1) and 311.14(1) *Criminal Code* (Cth)			
176 Total effective sentence:		177 8 years and 5 months' imprisonment		
178 Non-parole period:		179 5 years		
180 6AAA statement:		181 12 years' imprisonment with a non-parole period of 8 years		
182 Other relevant orders:		183 Forfeiture order		

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